1990

The State of Utah v. Martin Ray Amador : Brief of Appellee

Utah Court of Appeals

James L. Shumate; Attorney for Defendant-Respondent.
Kyle D. Latimer; Chief Deputy Iron County Attorney; Attorney for Plaintiff-Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 900007-CA
	)	
MARTIN RAY AMADOR,	)	Classification Priority 3
	)	
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

Appeal from Findings of Fact, Conclusions of Law, and an Order Terminating Probation Nunc pro Tunc, dismissing Order to Show Cause, in the Fifth Judicial District for Iron County, State of Utah, the Honorable J. Philip Eves presiding.

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JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Court of Appeal is claimed by the State of Utah to be established by 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended. However, the Defendant-Respondent respectfully contests that the Court of Appeals has any jurisdiction over this matter. This argument is taken from the fact that 77-35-26, (3), Utah Code Annotated, 1953, as amended, does not allow the State of Utah to appeal an Order Terminating Probation Nunc pro Tunc.

NATURE OF THE PROCEEDINGS

The State of Utah has appealed an order of the Fifth District Court terminating the probation of the Defendant-Respondent which also dismissed an Order to Show Cause which was erroneously issued by the Court on September 5, 1989, after the Defendant's probation terminated on September 1, 1989.

ISSUES PRESENTED ON APPEAL

1. Does the State of Utah have the right to appeal the order of the District Court terminating probation nunc pro tunc under the provisions of 77-35-26?

2. Did the trial court abuse its discretion in terminating the probation of the Defendant nunc pro tunc, whether or not that termination was made by reason of the trial court's interpretation of State vs. Green, 757 P.2d, 642 (Utah, 1988) or the court's construction of 77-18-1 in either its 1984 or 1989 versions.

3. Did the State comply with the prerequisites for tolling the termination of probation under the 1989 statute?

DETERMINATIVE STATUTES OR RULES

The statutes which are believed to be determinative in this matter are 77-18-1 (8)(b), Utah Code Annotated, 1989, 77-18-1 (10)(a), Utah Code Annotated, 1984, and 77-35-26, Utah Code Annotated, 1953, as amended. These are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The Defendant-Respondent accepts the Appellant's statement of the nature of the case, the course of the proceedings, the disposition of the trial court, and the relevant facts. The Defendant-Respondent would also point out that it took twelve days from the preparation of Agent Barton's progress violation report for that report to reach the County Attorney's office on September 1, 1989. There is no date in the file on the

progress violation report (R-103) to indicate when it was filed with the District Court. Because of this ommission it is impossible to determine when the progress violation report was filed with the District Court. However, the Order to Show Cause was signed by Judge Eves on September 5, 1989. It should also be noted that the charges alleging contributing to the delinquency of a minor in the Circuit Court were dismissed by order of the Circuit Court on October 20, 1989. A copy of that Order is attached hereto in the addendum.

SUMMARY OF ARGUMENT

The State of Utah has no authority to appeal the judgment of the trial court terminating probation nunc pro tunc. Even if the State may appeal the trial court's order, the trial court was well within its discretion in terminating the Defendant's probation and appropriated applied the holding in State v. Green, supra., and accurately applied 77-18-1 in either its 1984 or 1989 versions.

ARGUMENT

POINT I

THE STATE OF UTAH DOES NOT HAVE THE RIGHT TO APPEAL THE ORDER OF THE DISTRICT COURT TERMINATING THE DEFENDANT'S PROBATION NUNC PRO TUNC.

77-35-26, Utah Code Annotated, 1953, as amended, states that the prosecution may appeal

> ...a final judgment of dismissal, and order arresting judgment, an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial, a judgment of the court holding a statute or any

> part of if it invalid, an order of the court granting a pre-trial motion to suppress evidence, and an order of the court granting a motion to withdraw plea of guilty or no contest.

There is no provision in the Utah Code of Criminal Procedure that would permit the State of Utah to appeal an order of the judge either establishing or terminating probation. In Subsection (2) of the above cited statute, a defendant may appeal an order made after judgment affecting his substantial rights, but the State has no such right of appeal. Because of this failing in the statute, the State's appeal must be dismissed.

POINT TWO

THE TRIAL COURT DID NOT IMPROPERLY INTERPRET STATE V. GREEN, 757 P.2d 642 (Utah, 1988) OR THE APPLICATION OF 77-18-1 IN EITHER ITS 1984 OR 1989 VERSIONS.

In the Green case, supra., cited above, the defendant was placed on probation on May 29, 1984, for a period of eighteen months. His probation terminated by its own terms on November 29, 1985. The defendant committed additional offenses during the months of April, May, and June of 1985. On August 5, 1986, the Department of Adult Probation and Parole filed an affidavit alleging the violation of the defendant's probation which violation was later found by the trial court on February 3, 1987. The reported opinion in the Green case does not state when the Order to Show Cause was signed, but it presumed that it must have been signed after the filing of the Affidavit alleging the violation of probation--some nine months after the termination of probation. In the present case, it is alleged that the Defendant

violated his probation during the last month of his probation. There is no reference within the record indicating when the Affidavit of the Department of Probation and Parole or the progress violation report was submitted to the District Court. It is clear that the District Court's Order to Show Cause was signed on September 5, 1989, five days after the termination of the Defendant's probation. While the time periods are shorter in the instant case when compared to Green, the sequence of events appears identical to the Green case. Because of that factual similarity, it cannot be argued that the trial court in this matter erred in finding that Green applied and that the Defendant's probation should have been terminated on September 1, 1989.

It is also important to note that there is no date in the record indicating when the progress violation report was filed with the trial court in this matter. The Order to Show Cause was signed on September 5, and it is reasonable to assume that the progress violation report may have been filed on or about that date. However, even if the court improperly used the 1984 version of 77-18-1 instead of the 1989 version of that statute, the record would indicate that the Department of Adult Probation and Parole did not properly comply with the 1989 statute in order to toll the time for the termination of the Defendant's probation. From the facts in this case it would appear that the court ruled appropriately regardless of which version of the statute, the 1984 of the 1989, was used.

It is also important to note that even if this court determines that the trial court could have followed the 1989 statute and tolled the termination of the Defendant's probation, though the facts do not support such a position, the trial court still applied the appropriate statute even as found in the case cited by the State, State v. Norton, 675 P.2d 577 (Utah, 1983). In the instant case, the State is claiming that the 1989 amendment to the statute only affected a procedural or remedial change and did not affect the Defendant's substantive rights. It is clear that the period of time during which a person may be held under a probationary status is a matter of substantive right. The Norton case, supra., quoted with favor the case of Weaver v. Graham, 450 U.S. 24 (1981) where according to the United States Supreme Court "the reduction of 'gain time' credits, which would extend the Defendant's required time in prison by over two years, was held ex post facto because it 'increased punishment beyond what was prescribed when the crime was consummated'". In this case the substantive change extends the period during which the Defendant is under the jurisdiction of the court on an order of probation. This is clearly a substantive, not a procedural, amendment.

POINT THREE

EVEN UNDER THE 1989 STATUTE, THE STATE CANNOT SHOW THAT THE DEPARTMENT OF ADULT PROBATION AND PAROLE MET THE PREREQUISITES FOR TOLLING THE TERMINATION OF PROBATION.

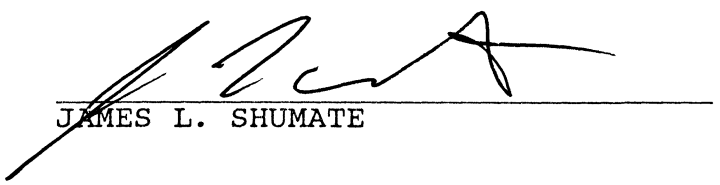
As noted above, this record is silent as to the date of

the filing of the progress violation report with the court. Without this key bit of information, it is impossible to tell whether or not the progress violation report was filed before or after September 1, 1989. The determination of the trial court should be honored by this court in the absence of clear error in the trial court's reading of the file.

CONCLUSION

Because the State cannot appeal this Order Terminating Probation Nunc pro Tunc and also for the reason that the State did not comply with the 1989 statute and the trial court acted well within its discretionary powers, the State's appeal should be dismissed and the trial court's Order Terminating Probation Nunc pro Tunc should be affirmed.

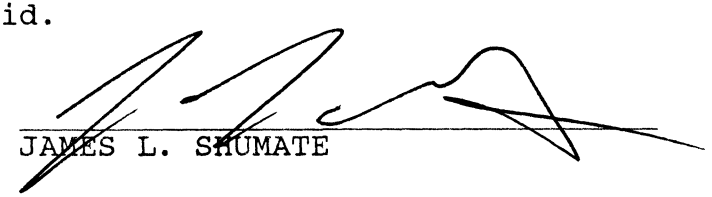
DATED this 9th day of May, 1990.



JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Kyle D. Latimer, Deputy Iron County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 9th day of May, 1990, first class postage fully prepaid.



JAMES L. SHUMATE

Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Restitution — Termination, revocation, modification, or extension — Hearings.

(1) (a) On a plea of guilty or no contest or conviction of any crime or offense, the court may suspend the imposition or execution of sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b) The legal custody of all probationers under the supervision of the department is with the Department of Corrections. The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court. The court has continuing jurisdiction over all probationers.

(c) The Department of Corrections shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on the type of offense, the demand for services, the availability of agency resources, the public safety, and other criteria established by the Department of Corrections to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and Board of Pardons on an annual basis for review and comment prior to adoption by the Department of Corrections.

(c) The Judicial Council and department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (2)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations committee.

(3) Notwithstanding other provisions of law, the Department of Corrections is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions, or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(4) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the Department of Corrections or information from other sources about the defendant. The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the Department of Corrections regarding the payment of restitution by the defendant. The contents of the report are confidential and not available except for purposes of sentencing as provided by rule of the Judicial Council and for use by the Department of Corrections.

(b) At the time of sentence, the court shall hear any testimony or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant.

(5) While on probation, and as a condition of probation, the defendant may be required to perform any or all of the following:

(a) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(b) pay amounts required under Chapter 32a, Title 77, Defense Costs;

(c) provide for the support of others for whose support he is legally liable;

(d) participate in available treatment programs;

(e) serve a period of time in the county jail not to exceed one year;

(f) serve a term of home confinement;

(g) participate in community service restitution programs;

(h) pay for the costs of investigation, probation, and treatment services;

(i) make restitution or reparation to the victim or victims in accordance with Subsections 76-3-201(3) and (4); and

(j) comply with other terms and conditions the court considers appropriate.

(6) The Department of Corrections is responsible, upon order of the court, for the collection of fines and restitution during the probation period in cases for which the court orders supervised probation by the department. The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure.

(7) (a) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions. If the defendant, upon expiration or termination of the probation period, has outstanding fines or restitution owing, the court may retain jurisdiction of the case and continue the defendant on bench probation or place the defendant on bench probation for the limited purpose of enforcing the payment of fines and restitution. Upon motion of the prosecutor or victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court or why the suspended jail or prison term should not be imposed.

(b) The Department of Corrections shall notify the sentencing court and prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines and restitution orders.

(8) (a) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation. Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and

conditions of probation or upon the issuance of an order to show cause or warrant by the court

(9) (a) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated

(b) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation modification or extension of probation is justified If the court determines there is probable cause it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked modified or extended

(c) The order to show cause shall specify a time and place for the hearing, and shall be served upon the defendant at least five days prior to the hearing The defendant shall show good cause for a continuance The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent The order shall also inform the defendant of a right to present evidence

(d) At the hearing, the defendant shall admit or deny the allegations of the affidavit If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders The defendant may call witnesses, appear and speak in his own behalf, and present evidence

(e) After the hearing the court shall make findings of fact Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked modified, continued, or that the entire probation term commence anew If probation is revoked the defendant shall be sentenced or the sentence previously imposed shall be executed

(10) Restitution imposed under this chapter is considered a debt for "willful and malicious injury" for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11, Section 523, U S C A 1985 1989

Supervision — Presentence investigation — Confidential — Terms — Restitution — Extension or revocation — Hearings.

(1) (a) On a plea of guilty or no contest or conviction of any crime or offense, the court may suspend the imposition or execution of sentence and place the defendant on probation. Supervised probation by the department may not be imposed by the court in cases of class C misdemeanors or infractions. The jurisdiction of all probationers referred to the Department of Corrections is vested in the court having jurisdiction; custody is with the Department of Corrections.

(b) The legal custody of all probationers not referred to the department is vested as ordered by the court having jurisdiction of the defendant. The court has continuing jurisdiction over all probationers.

(2) (a) The Department of Corrections shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on the type of offense, the demand for services, the availability of agency resources, and other criteria established by the Department of Corrections to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and Board of Pardons for review and comment prior to adoption by the Department of Corrections.

(3) Notwithstanding other provisions of law, the Department of Corrections is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions, or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(4) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, postpone the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the Department of Corrections or information from other sources about the defendant. The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the Department of Corrections regarding the payment of restitution by the defendant. The contents of the report are confidential and not available except for purposes of sentencing as provided by rule of the Judicial Council and for use by the Department of Corrections. At the time of sentence, the court shall hear any testimony or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant.

(5) While on probation, and as a condition of probation, the defendant may be required to perform any or all of the following:

(a) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(b) pay amounts required under Chapter 32a, Title 77, Defense Costs;

(c) provide for the support of others for whose support he is legally liable;

(d) participate in available treatment programs;

(e) serve a period of time in the county jail not to exceed one year;

(f) serve a term of home confinement;

(g) participate in community service restitution programs;

(h) pay for the costs of investigation, probation, and treatment services; and

(i) make restitution or reparation to the victim or victims in accordance with Subsections 76-3-201 (3) and (4).

Department of Corrections is responsible for the collection of fines and restitution during the probation period in cases where the court orders supervised probation by the department. The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order is considered a legal judgment under which the victim may seek civil remedy.

(7) (a) Upon completion without violation of 18 months' probation in felony or class A misdemeanor cases, or six months in class B misdemeanor cases, the probation period shall be terminated, unless earlier terminated by the court.

(b) The Department of Corrections shall notify the sentencing court and prosecuting attorney in writing 45 days in advance in all cases where termination of supervision will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines and restitution orders.

(c) At any time prior to the termination of probation, upon a minimum of five days' notice and a hearing or upon a waiver of the notice and hearing by the probationer, the court may extend probation for an additional term of 18 months in felony or class A misdemeanors or six months in class B misdemeanors if fines or restitution or both are owing.

(8) (a) All time served without violation while on probation applies to service of the total term of probation but does not eliminate the requirement of serving 18 consecutive months without violation in felony or class A misdemeanor cases, or six consecutive months without violation in class B misdemeanor cases. Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation. Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) When any probationer, without authority from the court or the Department of Corrections, absents himself from the state, or avoids or evades probation supervision, the period of absence, avoidance, or evasion tolls the probation period.

(c) Nothing in this section precludes the court from discharging a probationer at any time, at the discretion of the court.

(9) (a) Except as provided in Subsection (7)(c) of this chapter [section], probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court which authorized probation shall determine whether the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. If the court determines that there is probable cause, it shall cause to be served on the defendant a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended

(c) The order to show cause shall specify a time and place for the hearing, and shall be served upon the defendant at least five days prior to the hearing. The defendant shall show good cause for a continuance. The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. The order shall also inform the defendant of a right to present evidence.

(d) At the hearing, the defendant shall admit or deny the allegations of the affidavit If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) After hearing, the court shall make findings of fact. Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, [or] continued, or that the entire probation term commence anew. If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(10) Restitution imposed under this chapter is considered a debt for "willful and malicious injury" for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11, Section 523, U S C.A. 1985

1987

Circuit Court, State of Utah

IRON COUNTY, CEDAR CITY DEPARTMENT

STATE OF UTAH,

Plaintiff,

vs.

MARTIN RAY AMADOR,

Defendant.

Motion to DISMISS

Case No. 891000540

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Plaintiff moves the court pursuant to UCA 77-2-4 and UCA 77-35-25 (Crim. Rule 25) for an order dismissing the above-entitled information (or counts _____) as to defendant(s) Martin Ray Amador.

This motion is made in the furtherance of justice, for substantial cause, and upon the reasonable grounds set forth below.

- [x] Insufficient evidence (may refile)
- [ ] Essential witness is unavailable (may refile)
- [ ] Plea bargaining, guilty plea to another charge (bar)
- [ ] Diversion program completed by defendant (bar)
- [ ] Defendant is deceased or cannot be found (may refile)
- [ ] Preliminary hearing, no probable cause found (may refile)
- [ ] Unreasonable delay to trial (may refile)
- [ ] Unconstitutional delay to trial (bar)
- [ ] Information charges wrong offense (may refile)
- [ ] Court is without jurisdiction (may refile)
- [ ] Statute of limitations has run (bar)
- [ ] Misdemeanor has been compromised (bar)

The ground checked above is more fully explained as follows;

In further reviewing the police investigation, and the potential witnesses' statements, the State of Utah does not have sufficient evidence to make out a prima facie case. In the interests of justice, this case should be dismissed with prejudice.

DATE: October 19, 1989.

Signature of Prosecutor

Order

GOOD CAUSE APPEARING, IT IS ORDERED that this information (or count(s)_____) be dismissed for the reasons shown above as to the defendant(s) Martin Ray Amador.

Any bonds posted are ordered exonerated. (Exceptions, if any _____). Cash bail shall be returned to the defendant (or to _____)

DATE: 10-20-89

Circuit Judge